90-548

No. _____

Supreme Court, U.S.
FILED
SEP 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1990

DAVID L. FOSTER, by his Guardian ELIZABETH L. FOSTER,
Plaintiff-Appellant,

Petitioner,

v.

UNITED STATES FIRE INSURANCE COMPANY,
Defendant-Appellee,

Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the court of appeal's sua sponte holding that the district court's interpretation of a contract was a question of fact, reviewable under the clearly erroneous standard, so far depart from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision under Rule 10.1(a) of the Rules of the Supreme Court?

DESIGNATION OF PARTIES

The parties to the appeal before the United States Court of Appeals for the Fourth Circuit were David L. Foster, by his Guardian, Elizabeth L. Foster, plaintiff-appellant, and United States Fire Insurance Company, defendant-appellee. Said parties are the same as were before the court of original jurisdiction, the United States District Court for the Western District of Virginia, Danville Division.

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OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals sought to be reviewed is unpublished and is reproduced in the appendix, infra p. 1-13. An order on a Petition for Rehearing was entered in the case by the court of appeals on June 28, 1990 and is reproduced in the appendix, infra p. 14-15. The district court slip opinions and orders which are relevant to the issue raised are reproduced in the appendix, infra p.16-48.

JURISDICTIONAL STATEMENT

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The court of appeals judgment was entered on June 5, 1990. A Petition for Rehearing with a suggestion for rehearing in banc was

timely filed. It was denied by order of June 28, 1990. The instant petition for writ of certiorari is timely filed pursuant to Rules 29.2 and 29.3 of the Supreme Court Rules.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

The instant matter involves the court of appeals review of a question of law under the clearly erroneous standard. The question of law reviewed by the court of appeals was the district court's interpretation of a contract. Federal Rule of Civil Procedure 52(a) is relevant to the issue raised and provides:

> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in

granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its actions. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

Elizabeth L. Foster, Guardian of David L. Foster (hereinafter "Foster"), filed this diversity action pursuant to

28 U.S.C. § 1332 against United States Fire Insurance Company (hereinafter USFIC) requesting the district court adjudge that the terms of USFIC's Medalist Personal Catastrophe Liability Insurance Policy (hereinafter "Medalist policy"), issued to William A. Collins, Jr. (hereinafter "Collins"), provided coverage for Collins Funeral Home, Inc. (hereinafter "funeral home"), thus making USFIC liable for a judgment balance of $450,000, plus interest and costs, entered in the Circuit Court of Henry County, Virginia, for Foster against the funeral home for personal injuries sustained by Foster when he was a passenger in a vehicle owned by the funeral home and operated by a funeral home employee.

According to the Definitions

section of USFIC's Medalist policy, "The unqualified word insured includes

> (a) the named insured;
>
> (b) any relative if a resident in the same household as the named insured;
>
> (c) any other person under the age of 21 in the care of the insured; and
>
> (d) to the extent that underlying insurance provides coverage, to any other person or organization included as an insured in any underlying policy listed in the Schedule of Underlying Insurance attached to this policy."

There was no dispute between the parties that the funeral home was an "organization" within the meaning of paragraph (d). There was also no dispute that the funeral home was the named insured on an underlying policy listed in the Schedule of Underlying Insurance attached to the Medalist (the Pennsylvania National policy) and the

named insured on an unlisted underlying insurance policy (the USF&G policy).

The central issue in the case was the meaning of the unqualified phrase "underlying insurance" in paragraph (d). Foster argued that the rules of construction and interpretation, and the rule requiring that ambiguities be construed against the drafter, required that the unqualified phrase "underlying insurance" include both listed and unlisted underlying insurance thus affording the funeral home coverage for Foster's injuries since the USF&G policy was underlying insurance providing coverage to the funeral home, the named insured on the Pennsylvania National policy listed in the schedule attached to the Medalist policy.

The district court held that the

unmodified phrase "underlying insurance" unambiguously meant "underlying listed insurance" which thereby excluded the funeral home as an insured afforded coverage for Foster's injuries under the excess coverage and business pursuits provisions of USFIC's medalist policy. (App. 27-29) About the nature of its holding, the district court said:

> . . .[I] note that the parties did not present any issues of fact to the Court for resolution in this declaratory judgment action, and consequently I did not make any findings of fact. The only issue presented to the Court for decision was whether or not an umbrella insurance policy sold to William and Susan Collins provided coverage to Collins Funeral Home for an accident involving David L. Foster.
>
> Foster v. United States Fire Ins. Co., No. CA-88-84-D, slip op. at 1 (W.D. Va. July 27, 1989) (emphasis added)

(App. 32)

In affirming the District Court's

interpretation that "underlying insurance" unambiguously meant "underlying listed insurance," the Court of Appeals said,

> It is well settled that an appellate court's role in reviewing factual findings of a district court is limited. "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, then we cannot reverse. Likewise . . . no clear error [exists] if there are two permissible views of the evidence, and the district court as factfinder chooses one over the other." Davis v. Food Lion, 792 F.2d 1274, 1277 (4th Cir. 1986) (citation omitted). In the instant case, the district judge found that "the unmodified phrase 'underlying insurance' means 'underlying listed insurance.' . . . [T]he language of subpart (d) is straightforward and unambiguous." Foster v. United States Fire Ins. Co., supra, slip op. at 6. We hold that the district judge's finding regarding the ambiguity of the policy is not clearly erroneous. Accordingly, we affirm his ruling that the funeral home accident was not covered by the umbrella policy since the funeral home's USF&G policy was not listed as underlying insurance in the umbrella policy.

> Foster v. United States Fire Ins. Co., No 89-2447 Unpub'd Op. at 6 (4th Cir. June 5, 1990). (emphasis added)

(App. 11-12).

The parties presented no issues of fact to the court of appeals for decision and, as between the parties, there was no dispute that the de novo standard of review was to apply to the issue of insurance contract interpretation presented for review. (App. 39,40)

ARGUMENT FOR ALLOWANCE OF THE WRIT

It is elementary that the interpretation of contract language is a matter of law subject to de novo review. 9 Wright and Miller, Federal Practice and Procedure, § 2558 at 750, 751 (1990 supp.); see also, Southern National Gas v. Pursue Energy, 781 F.2d 1079, 1981

(5th Cir. 1986); (ambiguity is a question of law not subject to clear and erroneous standard); Western Contracting Company v. Dow Chemical, 664 F.2d 1097 (7th Cir. 1981) (nonambiguity is a conclusion of law reviewable de novo).

Until its decision in this case, the Fourth Circuit Court of Appeals had always granted de novo review of issues of contract interpretation and applied the state law rules for interpretation and construction. See, e.g., Atlantic Permanent Fed. Sav. & Loan v. Amer. Cas., 839 F.2d 212, 217 (1988); (applying Virginia's rules concerning ambiguous language); Fried v. North River Insurance, Co., 710 F.2d 1022 (1983); (applying New York rules of construction); Jefferson - Pilot Fire v. Boothe, Pritchard and Dudley, 638

F.2d 670 (1980). (applying, de novo, Virginia's rules of insurance contract interpretation and construction).

The mandate of Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 823 (1938) requires that the court of appeals apply the decisions of the Virginia Supreme Court relative to the interpretation and construction of contracts and the review thereof to the instant contract. Settled Virginia law holds that whether a contract is ambiguous is a question of law subject to de novo review, viz:

> The principles surrounding court review of contracts are well-settled. Contracts are not rendered ambiguous merely because the parties disagree as to the meaning of the language employed by them in expressing their agreement. See Manss-Owens Co. v. Owens & Son, 129 Va. 183, 197, 105 S.E. 543, 547 (1921). Further, the question whether a contract is ambiguous is not one of fact but one of law.

In addition, we have often said that it is the duty of the court to construe a contract as written:

> It is the function of the court to construe the contract made by the parties, not to make a contract for them. The question for the court is what did their contract. The guiding light in the construction of a contract is the intention of the parties as expressed by them in the words they have used, and courts are bound to say that the parties intended what the written instrument plainly declares.

Meade v. Wallen, 226 Va. 465, 467, 311 S.E.2d 103, 104 (1984); Megann Corp. v. Electrical Works, 203 Va. 259, 264, 123 S.E.2d 377, 381 (1962). A corollary to the last stated principle is that courts cannot read into contracts language which will add to or take away from the meaning of the words already contained therein. See Virginia Ry. Co. v. Avis, 124 Va. 711, 719, 98 S.E. 638, 640 (1919). Finally, on review, we are not bound by the trial court's construction of the contract provision here in issue. See Hutchison v. King, 206 Va. 619, 625, 145 S.E.2d 216, 221 (1965). We have an equal opportunity to consider the words within the four corners of the disputed provision.

Wilson v. Holyfield, 227 Va. 184, 188, 189 (1984) (emphasis added).

It is equally settled in Virginia that the rules of interpretation and construction for insurance contracts are those applicable to other contracts. Quesenberry v. Nichols, 209 Va. 667, 159 S.E.2d 636 (1968); Harleysville Mut. Ins. Co. v. Dollins, 201 Va. 73, 109 S.E.2d 405 (1959).

The court of appeals, even after the district court clearly stated that no questions of fact were presented for its decision, and even though the parties clearly presented only a question of law for review on appeal, held that contract interpretation was a question of fact reviewable under the clearly erroneous standard. Until the court of appeals opinion of June 5,

1990, there had been no question that the issue presented on appeal in this case was reviewable de novo. The opinion of the court of appeals gives no reason for the failure to follow its own precedent or the elementary rule that the interpretation of contract language is a question of law reviewable de novo.

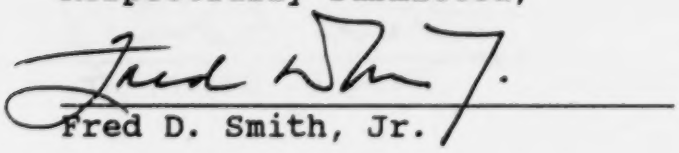
Had the court of appeals applied the Virginia rule requiring the adoption of the interpretation which allows indemnity, where the contract language is susceptible of two interpretations, instead of the clearly erroneous standard, which the court of appeals believed required following the district court's interpretation even if there were other reasonable interpretations, then Foster would have been afforded coverage under the medalist policy for

his serious injuries.

CONCLUSION

The Fourth Circuit Court of Appeal's sua sponte, arbitrary, and unprecedented holding that contract interpretation is a question of fact subject to the clearly erroneous standard of review, so far departs from the accepted and usual course of judicial proceedings as to require this court to exercise its power of supervision under Rule 10.1(a) of the Supreme Court Rules. Wherefore, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

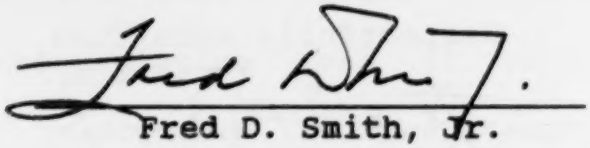


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CERTIFICATE OF SERVICE

I hereby certify, pursuant to Rule 29.3 of the Supreme Court Rules, that I have on this 26th day of September, 1990, mailed, with first-class postage pre-paid, three copies of the foregoing Petition for a Writ of Certiorari to Frank O. Meade, Woods, Rogers, and Hazelgrove, P. O. Box 560, Danville, Virginia 24541, who is the only party required to be served.



Fred D. Smith, Jr.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2447

DAVID L. FOSTER, by his Guardian,
ELIZABETH L. FOSTER,
Plaintiff-Appellant,

v.

UNITED STATES FIRE INSURANCE
COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Danville. Jackson L. Kiser, District Judge. (CA-88-84-D)

Argued February 7, 1990
Decided June 5, 1990

Before PHILLIPS and WILKINS, Circuit Judges, and WARD, Senior United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: Fred Dempsey Smith, Jr., Richmond, Virginia, for Appellant. Frank O. Meade, Danville, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Appellant Elizabeth Foster, guardian of David Foster, appeals the district court's denial of her request for declaratory relief. Appellant sought a declaratory judgment that the terms of an umbrella policy issued by United States Fire Insurance Company ("USFIC") to William Collins, Jr. provided coverage for Collins Funeral Home, thus making USFIC liable for a portion of a judgment against the funeral home arising from an accident in which

appellant's son was injured. The district court held that the funeral home was not an "insured" under the policy, thus relieving USFIC of any liability for the judgment against the funeral home. We affirm.

I.

On April 26, 1984, David Foster, while riding as a passenger in a van owned by Collins Funeral Home, Inc., and operated by David Clark, a funeral home employee, suffered serious injuries as a result of a single vehicle accident which occurred when Clark lost control of the van. Foster sued the funeral home, Clark, and William Collins, owner of the funeral home, in the Circuit Court of Henry County, Virginia. The trial court dismissed the action against Collins, and Foster took a voluntary

dismissal as to Clark. On January 2, 1987, a jury returned a verdict against the funeral home for $750,000. On February 15, 1987, the circuit court entered judgment against the funeral home in the amount of the jury award, plus interest and costs.

United States Fidelity and Guaranty Company ("USF&G") issued a policy to Collins Funeral Home in May of 1983 which provided $300,000 in single limit bodily injury coverage to the funeral home and its employees. USF&G has paid $300,000 of Foster's $750,000 judgment against the funeral home.

Foster argued that the accident was also covered under a one million dollar umbrella policy issued to William and Susan Collins by appellee USFIC. Foster contended that Collins Funeral Home

qualified as an "insured" under the USFIC policy, which defined "insured" as follows:

> The unqualified word insured includes:
>
> (a) the named insured;
> (b) any relative if a resident in the same household as the named insured;
> (c) any other person under the age of 21 in the care of the insured; and
> (d) to the extent that underlying insurance provides coverage, to any other person or organization included as an insured in any underlying policy listed in the Schedule of Underlying Insurance attached to this policy.

Joint Appendix at 11. Foster maintained that the funeral home qualified as an "insured" under subsection (d) above even though its USF&G policy, which provided coverage for the home and its vehicles, was not listed in the Schedule of Underlying Insurance. Rather, argued

Foster, the funeral home was an "insured" under (d) since it was an "insured" on another policy, albeit one that did not cover the funeral home vehicles, that was listed in the schedule.

The USFIC umbrella policy listed three underlying policies in the Schedule of Underlying Insurance: (1) a homeowner's policy issued to William and Susan Collins by USF&G; (2) an owner/landlord policy issued to William Collins and Albert and Carol Prillaman to cover jointly-owned rental property; and (3) an automobile policy issued by Pennsylvania National Mutual Casualty Insurance Company ("Penn National") covering the use of certain funeral home vehicles. USFIC conceded that the funeral home was a named insured on the

Penn National policy and both parties agreed that under subsection (d) the funeral home met the test of "any other person or organization included as an insured in any underlying policy listed in the Schedule of Underlying Insurance attached to this policy."

However, the district court determined that the definition of an "insured" in the umbrella policy was further restricted by the phrase "to the extent that underlying insurance affords coverage." Though the parties contested the meaning of this phrase, both agreed that the Penn National policy listed in the Schedule of Underlying Insurance did not cover the funeral home van or the accident which injured Foster. Foster argued that since the funeral home was covered for the accident that injured

him under another unlisted policy (the USF&G policy), the umbrella policy must also cover the accident because the funeral home was an insured in a policy (Penn National) that was listed in the schedule, even though the Penn National policy did not provide coverage for the accident.

The district court succinctly summarized Foster's position:

> In other words, (Foster) wishes to construe the phrase "to the extent that underlying insurance provides coverage" in subpart (d) to mean that, to the extent any insurance provides coverage for an accident, anyone who qualifies as an insured in any listed underlying policy is covered under the umbrella policy even though the listed policy under which the person qualifies as an insured does not cover the accident.

Foster v. United States Fire Ins. Co., No. CA-88-84-D, slip op. at 4 (W.D. Va. Apr. 21, 1989). The district court,

however, held that the phrase "underlying insurance" meant underlying listed insurance. Thus, the umbrella policy did not cover the funeral home accident since the funeral home's USF&G policy, which covered the accident, was not listed as underlying insurance in the umbrella policy. The district court also rejected Foster's alternative contention that the funeral home was covered under the business pursuits clause and the exclusions section of the umbrella policy. This appeal followed.

II.

On appeal, Foster argues that the district court erred in finding that the unqualified phrase "underlying insurance" denotes only underlying listed insurance. Foster contends that when the phrase "underlying insurance"

is construed and interpreted consistently throughout the umbrella policy, the phrase must include both listed and unlisted policies. Thus, maintains Foster, the funeral home is the named insured in the underlying policy listed in the schedule (the Penn National policy), is provided coverage by underlying insurance (the USF&G policy), and is therefore entitled to the excess coverage provided by USFIC's umbrella policy.

In addition to these standard rules of contract interpretation, Foster also relies on the oft-cited principle that ambiguous language in an insurance policy should be construed against the insurer and in favor of the insured. Foster contends that USFIC should have inserted the word "listed" before the

word "insurance" in subpart (d) or should have specifically excluded coverage under unlisted policies; however, since the company failed to do so, the ambiguity should be construed against USFIC.

It is well settled that an appellate court's role in reviewing factual findings of a district court is limited. "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, then we cannot reverse. Likewise . . .no clear error [exists] if there are two permissible views of the evidence, and the district court as factfinder chooses one over the other." Davis v. Food Lion, 792 F.2d 1274, 1277 (4th Cir. 1986) (citation omitted). In the instant case, the district judge

found that "the unmodified phrase 'underlying insurance' means 'underlying listed insurance.' Foster v. United States Fire Ins. Co., supra, slip op. at 6. We hold that the district judge's finding regarding the ambiguity of the policy is not clearly erroneous. Accordingly, we affirm his ruling that the funeral home accident was not covered by the umbrella policy since the funeral home's USF&G policy was not listed as underlying insurance in the umbrella policy.

We also agree with the district judge that a precondition for coverage under the business pursuits clause or the exclusions section, Foster's alternative argument, is that one must meet the definition of "insured." Because the incorporated funeral home

does not qualify as an "insured" for coverage of the van accident under the personal umbrella policy of Mr. and Mrs. Collins, the trial court correctly held that the business pursuits clause and exclusions section are inapplicable. Accordingly, the judgment of the district court is

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No 89-2447

DAVID L. FOSTER, by his Guardian, ELIZABETH L. FOSTER,

Plaintiff-Appellant,

v.

UNITED STATES FIRE INSURANCE COMPANY,

Defendant-Appellee.

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the

opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips with the concurrence of Judge Wilkins and Judge Ward.

For the Court,

JOHN M. GREACEN
CLERK

Filed, June 28, 1990
U.S. Court of Appeals
Fourth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

DAVID L. FOSTER, By his
Guardian, ELIZABETH L. FOSTER,

v. Civil Action No. 88-0034-D

UNITED STATES FIRE INSURANCE COMPANY.

ORDER

In accordance with the Memorandum Opinion filed today, it is hereby

ORDERED

1. Judgment is entered in favor of the defendant, United States Fire Insurance Company.

2. The Clerk is directed to strike this case from the active docket of this Court, and to send a certified copy of this Order to all counsel of record.

ENTERED this 21st day of April, 1989.

JACKSON L. KISER
United States District Judge

Date of Entry, April 21, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

DAVID L. FOSTER, By his
Guardian, ELIZABETH L. FOSTER,

v. Civil Action No. 88-0084-D

UNITED STATES FIRE INSURANCE COMPANY.

MEMORANDUM OPINION

This matter is ripe for judgment, the parties having submitted it to me for decision on the record. David Foster seeks a declaratory judgment that an accident in which Foster was injured is covered by an insurance policy that United States Fire Insurance Company ("U.S.Fire") issued to William A. Collins, Jr., and Susan A. Collins. Because I find that under the terms of the policy in question, the accident was

not covered, I must enter judgment for the defendant.

BACKGROUND

On April 26, 1984, David Foster was riding as a passenger in a van owned by Collins Funeral Home, Inc., and driven by its employee, David Clark. The van had an accident on Route 220 in Henry County, and Foster was injured. Foster sued the funeral home, Clark, and William Collins (the owner of the funeral home) in the Circuit Court of Henry County, Virginia, and was awarded damages of $750,000 against the funeral home on February 15, 1987.

United States Fidelity and Guaranty Company ("U.S.F.& G.") issued a policy to the funeral home, effective May 9, 1983, insuring two hearses and two sedans. In July 1983, the van involved

in the accident was added to this policy, and one hearse was deleted. This policy was in effect on the date of the accident and provided $300,000 in single limit bodily injury coverage to the funeral home and its employees. U.S.F.& G. has paid $300,000 on Foster's judgment against the funeral home.

Foster argues that the accident also was covered under a one million dollar umbrella policy issued to William and Susan Collins by United States Fire Insurance Company ("U.S. Fire"), the defendant in this case. The issue to be decided is whether the funeral home van was insured for the accident under the U.S. Fire umbrella policy.

DISCUSSION

On May 3, 1980, U.S. Fire issued an umbrella policy, with coverage of up to

one million dollars, to William A. Collins and Susan A. Collins, the named insureds. Foster argues that Collins Funeral Home also was an "insured" under this policy.

The umbrella policy defines "insured" as follows:

> The unqualified word insured includes:
>
> (a) the named insured;
>
> (b) any relative if a resident in the same household as the named insured;
>
> (c) any other person under the age of 21 in the care of the insured and
>
> (d) to the extent that underlying insurance provides coverage, to any other person or organization included as an insured in any underlying policy listed in the Schedule of Underlying Insurance attached to this policy.

Foster argues that, under provision (d) above, the funeral home was an "insured" because, even though the funeral home's U.S.F.& G. insurance policy was not

listed in the Schedule of Underlying Insurance, the funeral home was an "insured" on another policy that was listed in the schedule.

The U.S. Fire umbrella policy listed three underlying policies in the Schedule of Underlying Insurance. One policy was a homeowner's policy issued to William and Susan Collins by U.S.F. & G. A second was an owner/landlord policy issued by U.S.F. & G. to William Collins and Albert and Carol Prillaman to cover jointly-owned rental property in Collinsville. The third listed policy was an automobile policy issued by Pennsylvania National Mutual Casualty Insurance Company ("Penn National") to William and Susan Collins, to cover their use of certain funeral home vehicles. The defendant concedes that

the funeral home is a named insured on the Penn National policy. Both parties agree that, under subpart (d) of the definitions of "insured" in the umbrella policy, the funeral home met the test of "any other person or organization included as an insured in any underlying policy listed in the Schedule of Underlying Insurance attached to this policy." However, this definition is further restricted by another phrase: "to the extent that underlying insurance affords coverage." The parties dispute the meaning of this phrase, but the parties do not dispute the fact that the Penn National policy did not cover the funeral home van or the accident that injured Foster. The plaintiff contends that because the funeral home was covered for the accident that injured

Foster under another unlisted insurance policy, the umbrella policy must also cover that accident. In other words, the plaintiff wishes to construe the phrase "to the extent that underlying insurance provides coverage" in subpart (d) to mean that, to the extent any insurance provides coverage for an accident, anyone who qualifies as an insured in any listed underlying policy is covered under the umbrella policy even though the listed policy under which the person qualifies as an insured does not cover the accident.

As U.S. Fire points out, the funeral home did not purchase umbrella coverage, but under Foster's reading of the umbrella policy, the funeral home would nonetheless have umbrella coverage under the Collinses' policy.

Hypothetically, under Foster's reading, if the Collinses had listed an owner/landlord policy in the schedule of underlying insurance, and twenty co-owners were listed as insureds under that owner/landlord policy, those twenty co-owners would have umbrella coverage for auto accidents for which they had separate, unlisted insurance policies. Clearly, such an outcome would be absurd.

A telling point is that the plaintiff does not contend that William and Susan Collins believed that their umbrella policy provided coverage for accidents such as the one in this case. The plaintiff contends only that the language of the umbrella policy is ambiguous and must be construed against the drafter, U.S. Fire. It is true that

ambiguities in insurance policies should be resolved against the insurer. See United Services Automobile Association v. Webb, 235 Va.__, 369 S.E.2d 196, 198 (1988). If the language of a policy is unambiguous, however, the words must be given their ordinary meaning. Id.

A review of the umbrella policy indicates that when U.S. Fire wanted to extend the meaning of the phrase "underlying insurance" in include unscheduled underlying insurance, the language chosen is "any other underlying insurance." The policy is quite explicit about this, for example, on page three: "With respect to any occurrence not covered by the underlying policies or insurance described in the Schedule of Underlying Insurance attached or any other underlying insurance available to

the insured. . . ." Again, on page five, the language makes clear the intent to include unscheduled insurance policies in defining "retained limit": "the total of the applicable limits of the underlying policies listed in the Schedule of Underlying Insurance, and the applicable limits of any other underlying insurance available to the insured. . . ."

In contrast, subpart (d) under the definition of "insured" does not use the phrase "any other underlying insurance," and in the context of the definition, it is clear that the unmodified phrase "underlying insurance" means "underlying listed insurance." I find that the language of subpart (d) is straightforward and unambiguous. The funeral home accident was not covered by

the umbrella policy because the funeral home's U.S.F.& G. policy was not listed as underlying insurance in the umbrella policy.

Foster also contends that the funeral home is covered under the business pursuits clause and in the exclusions section of the umbrella policy. However, a precondition for coverage under the business pursuits clause or the exclusions section is that one must meet the definition of "insured." Inasmuch as the funeral home was not "insured" for the van accident under the umbrella policy, the business pursuits clause and exclusions section do not apply, either.

CONCLUSION

Because the accident in which Foster was injured was not covered under

the U.S. Fire Insurance umbrella policy issued to William and Susan Collins, I grant judgment to U.S. Fire Insurance Company.

A Judgment Order in accordance with this Opinion will be entered.

The Clerk is directed to send a certified copy of this Memorandum Opinion to all counsel of record.

JACKSON L. KISER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

DANVILLE DIVISION

DAVID L. FOSTER, BY HIS GUARDIAN,
ELIZABETH L. FOSTER,

v. Civil Action No. 88-0084-D

UNITED STATES FIRE COMPANY.

ORDER

For the reasons stated in the Memorandum Opinion filed this date, it is hereby ORDERED that the plaintiff's motion to alter or amend this Court's judgment of April 21 1989, is DENIED.

The Clerk is directed to send a certified copy of this Order to all counsel of record.

ENTER this 27th day of July, 1989.

JACKSON L. KISER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

DANVILLE DIVISION

DAVID L. FOSTER, BY HIS GUARDIAN,
ELIZABETH L. FOSTER,

v. Civil Action No. 88-0084-D

UNITED STATES FIRE COMPANY.

MEMORANDUM OPINION

This matter is before me on the plaintiff's motion to alter or amend the Court's judgment of April 21, 1989. Under Rule 59(e),[1] a motion to alter or amend a judgment serves the narrow purpose of allowing a party "to correct manifest errors of law or fact or to present newly discovered evidence." Waltman v. International Paper Co., 875 F.2d 468, 473 (5th Cir. 1989), citing

Keene Corp. v. International Fidelity Insurance Co., 561 F. Supp. 656, 665 (N.D. Ill. 1982), aff'd, 735 F.2d 1367 (7th Cir. 1984). I note that the parties did not present any issues of fact to the Court for resolution in this declaratory judgment action, and consequently I did not make any findings of fact. The only issue presented to the Court for decision was whether or not an umbrella insurance policy sold to William and Susan Collins provided coverage to collins Funeral Home for an accident involving David L. Foster.

Although the parties quibble with one or two factual points in my opinion, none of those points affects the substantial rights of the parties or has any bearing on the ultimate disposition of this case. I find that there are no

factual errors of any significance in my opinion.

Nor do I believe that the opinion contains any manifest errors of law. The opinion makes some reference to the intent of the parties in construing the insurance contract. The plaintiff argues that the correct test for construing an insurance policy is "what a reasonable person in the position of the named insured would have understood it to mean." See National Independent Coal Operators Association, Inc. v. Old Republic Insurance Co., 544 F. Supp. 520, 525 (W.D. Va. 1982). Assuming that this standard applies, I find that no reasonable person would suppose that the umbrella policy in question covered the plaintiff's accident. The umbrella policy in question clearly was designed

to provide excess coverage for the three listed underlying policies. The plaintiff makes the fanciful argument that the policy also provided umbrella coverage for Collins Funeral Home, which was not a named insured, merely because the funeral home appeared as an insured in one of the underlying listed policies, even though the listed policy did not cover the accident in question. Such a result would be completely at odds with the purpose of the umbrella insurance policy.

The plaintiff also again offers a hairsplitting argument that because the funeral home accident was <u>not</u> covered by any of the underlying listed policies, that the accident <u>must</u> be covered under the business pursuits clause. The business pursuits clause appears under

the Exclusions section of the policy. The clause states that the policy shall not apply

> with respect to business pursuits or business property (other than farms) of an insured, to any claim for loss or expense for which insurance is not afforded by any underlying policy listed or insurance described in the Schedule of Underlying Insurance attached, but this exclusion shall not apply with respect to the ownership, maintenance, use, loading or unloading of any automobile or watercraft.

(Emphasis added.)

I agree with the plaintiff that this clause provides business pursuits coverage for the use of automobiles and watercraft by those who are "insured" under the umbrella policy. Of course, to be "insured," one must meet the policy's definition of "insured." As I observed in my prior opinion, Collins Funeral

Home was not "insured" under the umbrella policy for the accident that injured Foster, and therefore, the business pursuits coverage for use of automobiles could not apply to Collins Funeral Home for that accident. I note that the business pursuits clause would apply to others who could meet the policy's definition of "insured," i.e., the named insured, or relatives in the same household as the named insured, or other people under age 21 in the care of the insured. The plaintiff does not contend that Collins Funeral Home meets any of these other definitions of "insured." The only possible category of "insured" that Collins Funeral Home might fit into is category 3(d) in the definitions section, which extends umbrella coverage to anyone included as

an insured in the underlying listed policies, only to the extent that the underlying policies provide coverage. Because the business pursuits clause applies only when underlying insurance does not provide coverage, it seems apparent that the business pursuits clause would never apply to someone who had umbrella coverage under 3(d) of the definitions. Collins Funeral Home could not possibly be covered under the business pursuits clause.

Conclusion

The plaintiff has pointed out no manifest errors of law or fact in my prior opinion. The plaintiff's motion to alter or amend the Court's judgment of April 21, 1989, shall be denied.

The Clerk is directed to send a

certified copy of this Memorandum Opinion to all counsel of record.

JACKSON L. KISER
United States District Judge

STATEMENT OF THE ISSUES
(from Brief of Plaintiff-Appellant)

1. Is Collins Funeral Home, Inc. an insured under paragraph 3(d) of the Definitions section of USFI's Medalist policy and thus entitled to excess coverage for bodily injury liability above the applicable limits of underlying insurance?

2. Is Collins Funeral Home, Inc. an insured under defendant's Medalist policy entitled to primary coverage for "Business Pursuits" liability subject to the "Other Insurance" clause and the $250.00 "Retained Limit" stated on the Declarations page?

STATEMENT OF ISSUE
(from Brief of Appellee-Defendant)

The sole issue in this case is whether Collins Funeral Home, Inc., was an insured, for a motor vehicle accident resulting in injuries to David L. Foster, under a Personal Catastrophe (umbrella) Policy,issued by United States Fire Insurance Company to Mr. & Mrs. William A. Collins, Jr.

(2)

No. 90-548

Supreme Court, U.S.
FILED
OCT 19 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1990

DAVID L. FOSTER, by his Guardian
ELIZABETH L. FOSTER,
Plaintiff-Appellant,

Petitioner,

v.

UNITED STATES FIRE INSURANCE COMPANY
Defendant-Appellee,

Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF BY RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. Whether the Trial Court and Court of Appeals Properly Ruled Under Virginia Law That a Funeral Home Did Not Have Coverage as an "Insured" Under a Personal Catastrophe (Umbrella) Policy Issued to the Owner of the Funeral Home Who Declined to Purchase a Similar Umbrella Policy for the Funeral Home Itself?

II. Whether This Case, Involving State Law Issues and Specific Facts and Insurance Policy Language, Merits Review by This Court Under Rule 10.1 of the Rules of the United States Supreme Court?

LIST OF PARTIES AND RULE 29.1 LIST

The petitioner in this case is David L. Foster, by his Guardian Elizabeth L. Foster, who was the plaintiff-appellant below. The respondent is United States Fire Insurance Company, defendant-appellee below.

United States Fire Insurance Company is a New York Corporation, a wholly owned subsidiary of Crum & Forster, Inc., a New Jersey Corporation. Crum & Forster, Inc., a New Jersey Corporation, is a wholly owned subsidiary of Xerox Financial Services, Inc., a Delaware Corporation, which is a wholly owned subsidiary of Xerox Corporation, a New York Corporation.

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No. 90-548

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DAVID L. FOSTER, by his Guardian
ELIZABETH L. FOSTER,
Plaintiff-Appellant,

Petitioner,

v.

UNITED STATES FIRE INSURANCE COMPANY,
Defendant-Appellee,

Respondent.

ON CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF BY RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

This case involves a state law insurance issue. The Fourth Circuit Court of Appeals, by a unanimous, unpublished, per curiam opinion, affirmed the trial court's ruling denying coverage under the terms of the applicable umbrella policy.

Petitioner, David L. Foster (Foster) was a passenger in a van owned by Collins Funeral Home, Inc. (Funeral Home) and driven by its employee, David Clark, when it was in a single vehicle accident. Foster sued Funeral Home, Clark and Mr. William Collins (Collins), the owner of Funeral Home, contending that Clark was acting as Collins' "personal agent." The case against Collins was rejected by the trial court and Foster nonsuited Clark. Foster proceeded solely against Funeral

Home and obtained a judgment for $750,000.00.

Foster then filed this suit in federal court for declaratory relief, seeking an adjudication that a personal catastrophe umbrella policy issued by United States Fire Insurance Company (U.S. Fire) to Mr. and Mrs. Collins afforded excess coverage to Funeral Home for the accident in question. The case was tried before the Court, without a jury, upon the pleadings, exhibits and a deposition of Harry Fletcher Smith, Jr. (Smith), the insurance agent who procured the umbrella policy for Collins.

By Order (and Memorandum Opinion) of April 21, 1989, the Trial Court held there was no umbrella coverage for the Funeral Home. The district court's opinion appears at pages 18-29 of the Appendix to Foster's Petition

(hereinafter "App. ___".) Foster filed a Motion to Alter or Amend the district court's decision pursuant to Federal Rules of Civil Procedure 59(e) and 52(b) which was denied by the district court. (App. 31-38.)

The Fourth Circuit Court of Appeals affirmed the trial court by a unanimous opinion which appears at pages 1-13 of the Appendix to Petitioner's Petition. Foster's Petition for Rehearing also was denied by the Court of Appeals. App. 14-15.

STATEMENT OF FACTS

The car accident for which Foster recovered a $750,000 state court judgment against Funeral Home occurred on April 26, 1984.

Funeral Home was covered by a Business Auto Insurance Policy issued by United States Fidelity & Guaranty Company

(U.S.F.&G.), effective May 9, 1983, insuring two (2) hearses and two (2) sedans. (Joint Appendix on appeal at page 134, hereinafter "JA ___".) On June 17, 1983, the van involved in the accident at issue was added to the policy. (JA 133.) This policy was renewed the following year, was in effect on the date of the accident, and afforded $300,000.00 coverage for operation of the van to Funeral Home and its driver, Clark.

Following the state court verdict, U.S.F.&G. paid $300,000.00 on the judgment obtained by Foster against Funeral Home. (JA 75-76.)

Pennsylvania National Mutual Insurance Company (Penn National) issued a policy to Funeral Home which insured two other vehicles. Mr. and Mrs. Collins did not own any automobiles; they used

these vehicles, titled in the name of Funeral Home, as their own. (JA 61-62.) The Penn National policy was endorsed to provide "drive other vehicles" coverage for Mr. and Mrs. Collins. Thus, they were provided liability protection as if they owned the vehicles and the policy were issued to them. (JA 66.) The Penn National policy did not provide coverage for the Funeral Home's van, hearses or sedans which were covered under the U.S.F.&G. policy.

Collins obtained a personal catastrophe umbrella policy for himself and his wife which is the subject of this litigation. He obtained the personal umbrella policy through insurance agent Smith who previously had given a quote for a similar policy to Mr. Albert Prillaman with whom Collins jointly owned a rental house. (JA 56-59.) Collins met

with Smith and provided all necessary information for obtaining the personal umbrella coverage. (JA 58.) The insureds are listed on the insurance application as William A. Collins and Susan A. Collins. In addition to their residence in Franklin County, the application notes two other residences, rented to others: one at Fripp Island, S.C., and another jointly owned with the Prillamans at 124 N. Daniel Creek Road, Collinsville, Va. (JA 96.)

The Schedule of Underlying Insurance for the umbrella policy was prepared by the Underwriting Department, based on data in the application. (JA 79, 80.) The U.S. Fire umbrella policy listed three underlying policies in the Schedule of Underlying Insurance. One policy was a homeowner's policy issued to William and Susan Collins by U.S.F.&G. A second

was an owner/landlord policy issued by U.S.F.&G. to William Collins and Albert and Carol Prillaman to cover jointly owned rental property in Collinsville. The third listed policy was the automobile policy issued by Pennsylvania National Mutual Casualty Insurance Company ("Penn National") to cover William and Susan Collins use of the two Funeral Home vehicles routinely used by them as their own.

As of the accident date, the U.S. Fire policy, a "personal umbrella policy", was still in effect and the scheduled (listed) underlying policies were the same. (JA 72.) There is no dispute that none of the underlying policies listed on the schedule provided coverage to Funeral Home for the accident in question.

Collins expressly declined to purchase an umbrella policy for his business, when Smith, the insurance agent, talked to him about one. (JA 76-77.) Foster contends that Funeral Home is an insured for the accident in question under the terms of Collins' personal umbrella policy. The courts below held to the contrary.

REASONS FOR DENYING THE WRIT

I. The Central Issue in This Case Was Correctly Decided Below: The Lower Courts Properly Determined That Funeral Home is Not an Insured Under Collins' Personal Umbrella Policy.

Collins purchased a personal umbrella liability policy for himself and his wife, but declined to purchase similar umbrella liability coverage for Funeral Home. (JA 76-77.) Collins' personal one million dollar umbrella policy provides coverage only to

"insureds" within the meaning of the policy. The sole issue in this case is whether Funeral Home is to be identified or included as an insured on Collins' personal umbrella policy.

The policy defines "Insured" as follows:

> The unqualified word insured includes:
> (a) The named insured;
> (b) any relative in the same household as the named insured;
> (c) any other person under the age of 21 in the care of the insured; and
> (d) to the extent that underlying insurance affords coverage, to any other person or organization included as an insured in any Underlying Policy listed in the Schedule of Underlying Insurance attached to this policy.

(JA 11) (emphasis added.)

There is no policy listed on the umbrella policy's Schedule of Underlying Insurance under which Funeral Home was covered for the accident in question. There is no dispute that the U.S.F.&G.

policy under which Funeral Home did have coverage for the accident is not listed on the Schedule of Underlying Insurance.

Foster argues that Funeral Home, nevertheless, was an insured for coverage under Collins' personal umbrella policy because Funeral Home was an insured in another policy (Penn National) that was listed in the schedule even though the Penn National policy did not provide coverage for the accident. [1] As stated by the trial court, Foster's strained reading is untenable:

> In other words, the plaintiff wishes to construe the phrase 'to the extent that underlying insurance provides coverage' in subpart (d) to mean that, to the extent <u>any</u> insurance provides coverage for an accident, <u>anyone</u> who qualifies

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[1] As noted above the Penn National policy insured the vehicles owned by Funeral Home but driven by Mr. and Mrs. Collins as their own. It did not provide coverage for the van involved in the accident.

> as an insured in any listed underlying policy is covered under the umbrella policy even though the listed policy under which the person qualifies as an insured does not cover the accident.

(App. 24) (emphasis in original.) [2]

The absurdity of Foster's position becomes apparent by reference to a hypothetical. If, for example, under Foster's logic, Collins had listed an owner/landlord policy in the schedule of underlying insurance, and twenty co-owners were listed as insureds under that owner/landlord policy, those twenty co-owners would have umbrella coverage for auto accidents for which they had separate, unlisted insurance policies.

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[2] In essence Foster seeks to eliminate the phrase "to the extent that underlying insurance affords coverage" from the subpart d definition of "insured" and to extend coverage to any entity which could receive coverage under a listed policy regardless of whether the listed policy "affords coverage" for the accident at issue.

As the trial court observed, such an outcome would be ludicrous. (App. 25.) As Virginia law makes clear, "absurd results" in construction of insurance contracts are to be avoided. Transit Casualty Co. v. Hartman's Inc., 218 Va. 703, 239 S.E.2d 894 (1978).

The outcome sought by Foster also would be inconsistent with the intent of the parties to the insurance contract. In construing or interpreting an insurance policy courts must ascertain and effectuate the intention of the contracting parties. The Court must place itself in the position of the parties when the contract was entered into and consider the purposes, subject matter and circumstances under which the parties' minds met. Jackson v. North American Assurance, 212 Va. 177, 183 S.E.2d 160 (1971).

Neither Foster nor Funeral Home were a party to Collins' umbrella insurance contract.

Collins, at the time his co-owner (Prillaman) of rental property applied for an umbrella policy, told agent Smith he was interested in such a policy. Subsequently, Collins applied for and received a personal umbrella policy. Either before or soon after it was issued, Smith talked to Collins about a business umbrella policy for the funeral home. Collins did not desire such a policy. (JA 76-77.)

Indeed, Foster never contends that the parties intended that the umbrella policy provided coverage for accidents such as the one in this case. Foster contends only that the language of the umbrella policy is ambiguous and, therefore, should be construed against

the drafter, U.S. Fire, no matter how unfair or absurd the result. In Virginia, however, the rule of reason governs in construction of insurance contracts and even if ambiguities in policy language are alleged, courts are not permitted to adopt a construction not justified by the intent of the parties. See Atlantic Life Ins. Co. v. Bender, 146 Va. 312, 131 S.E. 806 (1921); Phoenix Indemnity Co. v. Anderson, 170 Va. 406, 196 S.E. 629 (1938); First American Title Ins. Co. v. Seaboard Sav. & Loan Assoc., 227 Va. 379, 315 S.E.2d 842 (1984).

Moreover, as the trial court properly determined, the umbrella policy in this case is straightforward and unambiguous. Where the language of a policy is unambiguous, the words must be given their ordinary meaning. Atlas Underwriters, Ltd. v. Meredith-Burda,

Inc., 231 Va. 255, 259, 343 S.E.2d 65, 68 (1986).

When the policy is viewed in its entirety, as it must be (Suggs v. Life Insurance Co. of Virginia, 207 Va. 7, 147 S.E.2d 707 (1966)), there is no doubt that the reading urged by Foster is not the reading contemplated by the parties. A review of the umbrella policy reveals that when the parties intended to extend the meaning of the phrase "underlying insurance" to include unscheduled underlying insurance, the language utilized was "any other underlying insurance."

Use of this language appears in several places; for example, on page three under "supplementary payments" (JA 10): "With respect to any occurrence not covered by the underlying policies or insurance described in the Schedule of

Underlying Insurance attached or any other underlying insurance available to the insured. . . ." On page five (JA 12), again, the policy states the intent to include unscheduled insurance policies in defining "retained limit": "the total of the applicable limits of the underlying policies listed in the Schedule of Underlying Insurance, and the applicable limits of any other underlying insurance available to the insured. . ." (App. 27.)

As the trial court found in analyzing the definition of "insured": "In contrast, subpart (d) under the definition of 'insured' does not use the phrase 'any other underlying insurance,' and in the context of the definition, it is clear that the unmodified phrase 'underlying insurance' means 'underlying listed insurance'." (App. 27) (emphasis in original.)

The trial court properly found the language of subpart (d) to be unambiguous. (App. 27.) The Funeral Home accident was not covered by the umbrella policy because Funeral Home's U.S.F.&G. policy was not listed as underlying insurance in the umbrella policy. No policy listed on the Schedule of Underlying Insurance afforded coverage to Funeral Home for the accident at issue. To hold that Collins' personal umbrella policy afforded coverage to Funeral Home under these circumstances would be to rewrite the agreement of the parties.

II. This Properly Resolved Case, Involving State Law Issues and Specific Facts and Insurance Policy Language, Does Not Merit Further Review by This Court.

There is no need for this Court to exercise its power of supervision under Rule 10.1(a) of the Rules of the Supreme Court where the decisions below justly and properly resolved this case. Foster does not so much argue that the wrong result was reached, but contends that the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a) was wrongly applied to the trial court's conclusions. Suffice it to say that the trial court's analysis was buttressed by critical factual issues which were virtually undisputed. First, Collins flatly rejected obtaining an umbrella policy for Funeral Home (JA 76-77). Moreover, the intent of the parties to the contract, in light of surrounding circumstances, was

that the accident in question should not be covered under Collins' personal umbrella policy. The trial court specifically observed that Foster "does not contend that William and Susan Collins believed that their umbrella policy provided coverage for accidents such as the one in this case." (App. 25.) The lower courts' decisions properly adhered to the intent of the parties and the language of the policy.

The petition also is inappropriate for further review because it does not involve issues of broad precedential value. The underlying issue involves a pure state law question which hinges on the specific facts and applicable policy language of this case.

After fully considering the policy language and surrounding circumstances, the courts below properly declined

Foster's invitation to redraft Collins' policy in a manner wholly inconsistent with the intent of the parties to the contract. That decision is in keeping with Virginia law and does not require further review.

CONCLUSION

The courts below correctly resolved the state insurance law issue involved in this case. For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

UNITED STATES FIRE
INSURANCE COMPANY

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CERTIFICATE

I, the undersigned, do hereby certify that a true and correct copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was sent by first-class mail to counsel for petitioner, Fred D. Smith, Jr., Fred D. Smith, Jr., P.C., 7814 Carousel Lane, Suite 400, Richmond, Virginia 23294, this 19th day of October, 1990.

Frank Friedman

No. 90-548

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1990

DAVID L. FOSTER, by his Guardian ELIZABETH L. FOSTER,
Plaintiff-Appellant,

Petitioner,

v.

UNITED STATES FIRE INSURANCE COMPANY,
Defendant-Appellee,

Respondent.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this case merits summary reversal and remand pursuant to Supreme Court Rules 10.1(a) and 16.1 when it is undisputed that the only issue that can be dispositive of this case is a question of state law which was never addressed by the court of appeals?

DESIGNATION OF PARTIES

The parties to the appeal before the United States Court of Appeals for the Fourth Circuit were David L. Foster, by his Guardian, Elizabeth L. Foster, plaintiff-appellant, and United States Fire Insurance Company, defendant-appellee. Said parties are the same as were before the court of original jurisdiction, the United States District Court for the Western District of Virginia, Danville Division.

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VIRGINIA SUPREME COURT

Jackson v. North American Assurance,
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RULES OF COURT

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ARGUMENT

Respondent's Brief in Opposition does not dispute that the court of appeals' sua sponte holding that contract language is a question of fact, subject to review under the clearly erroneous standard, departs from the accepted principle that contract language is a question of law reviewable de novo. Rather, Respondent attempts to avoid addressing the merits of this Petition by asserting that this case was correctly decided by the court of appeals under applicable Virginia law.

This attempt must be rejected because the opinion of the court of appeals plainly states that it's decision is based solely upon application of the clearly erroneous standard of FRCP 52(a) in accordance

with its decision in Davis v. Food Lion, 792 F.2d 1274, 1277 (4th Cir. 1986) (an action to recover uncompensated overtime under 29 U.S.C. § 207 (a) (1)). (App. 11, 12).

There is no dispute that settled Virginia law holds contract language to be a matter of law subject to de novo review. Nevertheless, the court of appeals refused to apply Virginia law to this contract interpretation case because it held, without citation to any authority, that contract interpretation was a fact issue subject to review under FRCP 52(a). (App. 11, 12).

Respondent's claim that the court of appeals decided this case under Virginia law is simply a gross misrepresentation and it would be manifestly unjust to deny this Petition

on that basis because the very error Petitioner complains of is the court of appeals failure to apply Virginia law, de novo, to the contract interpretation issue presented by this case.

Since the trial court found no facts and the court of appeals decision was not based on Virginia law, the Respondent's Brief asks this Court to pretend that both those events happened. Once this pretense is recognized, the arguments advanced by Respondent's Brief in Opposition are clearly groundless.

Respondent's Brief in Opposition discusses two circumstances mentioned by the trial court as evidence that USFIC and the funeral home did not intend for the Medalist policy to cover accidents such as the one in which Foster was injured, viz: (1) no testimony from the

funeral home president, William A. Collins, Jr., that he, or his wife, believed that the Medalist Policy covered this accident and (2) the funeral home at some unspecified time declined to purchase an umbrella policy. Respondent contends that in view of settled Virginia law that courts are to ascertain and effectuate the intent of the contracting parties then the two circumstances mentioned are sufficient for a finding that USFIC and the funeral home did not intend to cover Foster's accident. However, Respondent conveniently overlooks that the trial court made no findings of fact (App. 32) and that the court of appeals decision was not based on Virginia law. (App. 11,12).

If it is assumed that the trial

court made a finding of fact about the parties' intent to cover Foster's injuries under the Medalist policy, the Respondent has misstated the Virginia law applicable to that fact.

Respondent correctly cites Virginia Supreme Court decisions holding that courts are to ascertain and effectuate the intent of the parties in interpreting contract language. However, Respondent fails to point out the method prescribed by those decisions for ascertaining and effectuating the intent of the parties.

Jackson v. North American Assurance Society of Virginia, 212 Va. 177, 183 S.E.2d 160 (1971), cited by Respondent, clearly defines the method for deriving the intent of the parties to an insurance contract:" . . . an

established rule may suffice to supply the parties intention . . .: If language used in an insurance policy is susceptible of two meanings, one of which will permit recovery and the other will not, the language should be construed most favorably to the insured." Id. at 177, 178.[1]

Under Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), Petitioner was entitled to de novo review of the contract interpretation issue presented

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[1] Respondent also overlooks settled Virginia law holding that (1) the availability of separate, additional coverage is irrelevant to the determination of whether particular policy language provides coverage, and (2) an insured's belief about the scope of coverage afforded by the policy is also irrelevant in deriving the meaning of policy language. Webb v. USAA, 235 Va. 655, 657-8, 369 S.E.2d 196, 198-9 (1988); Carey v. State Farm Mutual Insurance Company, 247 F. Supp. 381, 384 (E.D. Va. 1965), aff'd 367 F.2d 938 (4th Cir. 1966).

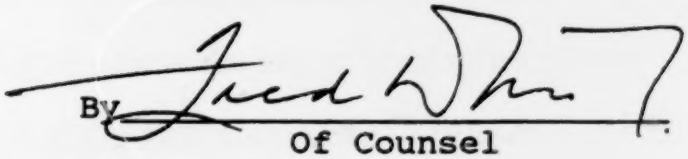
by this case and to the application of Virginia law. Petitioner received neither.

CONCLUSION

There being no dispute that under Erie Railroad Co. v. Tompkins the court of appeals was required to review this case de novo and apply Virginia law, and it appearing from this record that the court of appeals has failed to do that, Petitioner respectfully requests that the decision of the court of appeals be summarily reversed and this case remanded with instructions to review the issue presented de novo under Virginia law.

Respectfully submitted,

DAVID L. FOSTER, by his Guardian, ELIZABETH L. FOSTER

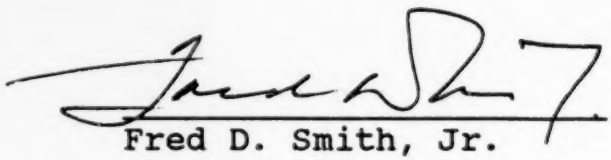
By 
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CERTIFICATE OF SERVICE

I hereby certify, pursuant to Rule 29.3 of the Supreme Court Rules, that I have on this 31st day of October, 1990, mailed, with first-class postage pre-paid, three copies of the foregoing Reply Brief to Respondent's Brief in Opposition to Petition for Writ of Certiorari to Frank O. Meade, and Frank K. Friedman, Woods, Rogers & Hazlegrove, Post Office Box 720, Roanoke, Virginia

24004-0720, who are the only parties required to be served.



Fred D. Smith, Jr.